(2) (1)

Nos. 84-229, 84-5052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH ACCARDI, *et al.*,

Petitioners,

v.

ROBERT J. DAVIDSON, Jr., etc., *et al.*,

Respondents.

SHIRLEY A. ZAHN, Administratrix, etc.,

Petitioner,

v.

ROBERT J. DAVIDSON, Jr., etc., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT ROBERT J. DAVIDSON, JR.'S BRIEF IN OPPOSITION

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September 12, 1984

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STATUTORY PROVISIONS INVOLVED

The statutory provisions of Title 29, United States Code, quoted by petitioners contain typographical errors and are, therefore, reproduced here.

§ 1113. Limitation of actions

(a) No action may be commenced under this subchapter with respect to a fiduciary's breach of any

responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this subchapter;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

§ 1002. Definitions

For purposes of this subchapter:

* * *

(21)(A) . . . a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. . . .

* * *

COUNTERSTATEMENT OF THE CASE

1. *Proceedings in the Courts Below*

The Complaint was filed on October 19, 1981, by Robert J. Davidson, Jr. ("Davidson"), who has been a participant in Local 666 Benefit Trust Fund ("the Fund") since 1969. Claims were brought primarily under the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001 *et seq.* Davidson sought to protect the Fund from monetary losses caused by improper loans made to Richmond Electricians' Building Corporation ("REBCOR"), a wholly owned subsidiary of Local Union 666, International Brotherhood of Electrical Workers (the "Local" or "Local 666"). Named as defendants were certain former and current fiduciaries to the Fund.

The case was submitted for decision to the district court on the basis of a stipulated record including a lengthy Stipulation of Facts and over 3,000 pages of Stipulated Exhibits. With leave of the district court, Davidson moved, and the court granted his motion, to amend his complaint to conform to the evidence. [Appendix to Joint Petition of Accardi, *et al.* ("App."), p. la.]

The district court entered judgment against six former trustees of the Fund (the "trustees" or the "lending trustees") and Shirley A. Zahn, administratrix of the estate of Willie Zahn ("Zahn"), former administrator of the Fund (collectively referred to as the "lending fiduciaries"). The lending fiduciaries were found personally liable in the amount of $440,800 plus prejudgment interest,

costs and attorneys' fees. (App. pp. 1a-3a.)

With respect to the claims against the other defendants, the district court found that two other former fiduciaries and the current trustees to the Fund had "eluded" liability. The district court dismissed a cross-claim filed by the current trustees against the lending fiduciaries. (App. pp. 3a, 57a.)

The court of appeals unanimously affirmed the decision of the district court in an unpublished opinion, deeming further discussion of the issues unwarranted. (App., p. 83a.)

2. *Background*

The Fund was established in 1968 by Local 666 and the Virginia Chapter, National Electrical Contractors Association ("NECA") for the purpose of providing health and welfare benefits for NECA contractor employees and their families. The Fund is managed by six trustees, three appointed by Local 666 and three appointed by NECA.

Eligible participants and beneficiaries of the Fund include: (1) employees, generally electricians, working under a collective bargaining agreement between Local 666 and NECA; (2) certain non-union employees; (3) dependents of covered employees; (4) retired employees; (5) disabled employees; and (6) surviving spouses and orphans of deceased employees.

3. *The Lending Transaction and Zahn's Involvement*

In 1971, Local 666 set up a Building Committee to

oversee the purchase of property and construction of a building to house the Local's offices. In September of 1972, Local 666 established REBCOR for the purpose of owning and constructing the building. During the period from September 1972 through the end of 1973, REBCOR purchased property for $137,500 and had architectural plans drawn up for what was proposed to be a $900,000 building.

On April 4, 1974, the REBCOR directors, including lending fiduciaries Nash, Van Fossen and Zahn, received a construction estimate of $1,878,376 for a proposed three story building with two floors of rental space. The REBCOR directors recognized that a substantial increase in Local members' assessments would be required for REBCOR to afford this proposed building.

At Local membership meetings held in March and April 1974, motions to increase working assessments were defeated. On May 2, 1974, the REBCOR directors made a decision to postpone the building because they could not afford it. However, at a Local meeting held the very next day, a motion was adopted to build the building and, when additional money was needed to meet expenses, to come back to the Local members at that time for an assessment increase. Five days later, the REBCOR directors decided to proceed with construction, and on May 23, 1974, without any commitment or contingency for financing, Local/REBCOR president Conley L. Bodsford signed a $1,757,500 construction contract. During this time period, Bodsford and Zahn had met with and been refused a loan by a commerical lending institution.

Zahn held himself out, and was held out by the trus-

tees, as the administrator of the Fund. As the Fund's salaried administrator, Zahn handled the day-to-day management and administration of the Fund. Trustees' meetings, on the other hand, were held four times in 1974, five times in 1975, and three times in 1976. Trustees' meetings were held sporadically until mid-1977. Zahn had a history of handling the investment of Fund reserves prior to the making of the REBCOR investment.

At the trustees meeting held, without a quorum, on the afternoon of June 7, 1974, union trustees Nash, Van Fossen, and Cook and employer trustee Accardi adopted a motion to negotiate a loan with REBCOR, subject to final approval by the full board of trustees. They directed a committee composed of Zahn and trustees Accardi and Cook to review and approve loan documents to be prepared by the Fund's attorneys in order to obtain a complete understanding of their terms and conditions. If the committee of three approved the loan, the entire board of trustees would vote on whether to make it. The note and deed of trust were drafted by the Richmond law firm of McGuire, Woods & Battle in consultation with Zahn.

Construction began sometime between July 5, 1974, and August 2, 1974.

By letter dated October 31, 1974, attorney Carle E. Davis, with McGuire, Woods & Battle, advised Willie M. Zahn of Local 666, IBEW, that the loan would not be a prohibited transaction under ERISA if a reliance theory of the term "binding contract" were finally adopted under § 414(c)(1) of ERISA and if the loan were made at arm's length. The Davis letter was based, in part, on the dual assumptions that the trustees had made

a loan commitment before July 2, 1974, and that REBCOR and the Local had relied on such a commitment.

On December 5, 1974, the Local membership approved an assessment increase, which was less than that increase the REBCOR directors had previously determined was necessary to fund the building project.

At a trustees' meeting on December 13, 1974, attended by all of the trustees, the trustees unanimously passed a motion to lend REBCOR $1 million at a ten percent interest rate, payable monthly. Zahn, who was in attendance, knew that REBCOR would ultimately need to borrow about $1.5 million. Yet, he limited his first request for funds, acting as REBCOR's spokesman, to $1 million. Prior to agreeing to lend the $1 million, the trustees did not require either REBCOR or Local 666 to provide the Fund with any documentation. The *only* condition the trustees imposed upon REBCOR prior to this extension of credit was that REBCOR execute a deed of trust and a deed of trust note, which were not executed until January 23, 1975.

Trustees Nash and Van Fossen, who voted on December 13, 1974, to lend the $1 million, were serving contemporaneously as officers and directors of REBCOR and as officers of the Local. Employer trustees Baker and Koch were members of Local 666. Additionally, Zahn played a major role in organizing REBCOR and getting it incorporated. Zahn was on REBCOR's initial board of directors. From REBCOR's inception, and on behalf of REBCOR and Local 666, Zahn oversaw (1) dealings with architects; (2) the location and purchase of the site; (3) construction bid solicitation; (4) dealings with the successful bidder through the completion of

construction in 1976; (5) negotiation and administration of the financing of the building from 1974 through 1976; and (6) dealings with REBCOR's and the Fund's attorneys, McGuire, Woods & Battle. Throughout this time and while serving as the Fund's administrator, Zahn was a Director of REBCOR and its Registered Agent.

At this same time, Bodsford, the president of REBCOR and the Local, worked as a superintendent for an electrical contractor, working directly under and out of the same office as Joseph Accardi who was then Chairman of the Trustees. During the same period, Trustee Nash was working as a foreman under Bodsford.

The $1 million loan transaction was closed on January 23, 1975, and the first loan proceeds of $80,244.03 were disbursed on the same date. No loan origination fee was collected. Interest on the deed of trust note was payable monthly commencing March 1, 1975. The note provides that the principal is due and payable within ninety days of demand, but not later than June 30, 1984. No principal repayment schedule is provided for in the note. Although the deed of trust specified the intention of the parties to adjust the interest rate from time to time, no reference is made in the note for adjustment of the interest rate and no specific mechanisms for increasing the interest rate were established. The note was secured by a deed of trust on REBCOR's property, which was executed by Nash as secretary of REBCOR.

Sometime after February 5, 1975, Nash, Van Fossen, and Zahn, acting as directors and on behalf of REBCOR while continuing to serve as fiduciaries to the Fund, joined in the execution of a board of directors' consent resolution authorizing REBCOR to borrow the initial

$1 million from the Fund and up to an amount not to exceed $1.5 million. This resolution specified that the rate of interest be adjusted from time to time, and the resolution was back dated to January 23, 1975. This resolution was the first formal act by the REBCOR board of directors approving the borrowing of $1 million.

Local 666 had paid REBCOR over $100,000 per year since 1973 in order that REBCOR could meet its financial obligations. Despite the history of the Local funnelling substantial funds to REBCOR in order to keep REBCOR solvent, the trustees did not require Local 666 to be signatory to the $1 million note. In fact, the decision to make the loan was predicated on the Local's continued funding of REBCOR, which continued to exceed $100,000 in years subsequent to 1975. REBCOR was incorporated by the Local, under directions from the International Office of the IBEW (the "International"), to insulate the Local from responsibility for the building corporation's debts. This fact did not, however, concern the lending trustees.

On August 25, 1975, after more than $800,000 had been disbursed by the Fund, and pursuant to Zahn's report that REBCOR would need an additional loan of approximately $400,000 to complete construction, the trustees agreed to make an additional $400,000 available to REBCOR. The lending of additional funds was to be conditioned on an agreement by REBCOR to pay any interest incurred by the Fund as a result of any borrowings made necessary because of the REBCOR loan.

At this time, REBCOR was over $12,000 behind in its interest payments to the Fund. The trustees did not attempt to evaluate any of the following: REBCOR's

need for additional funds; the value of the collateral; the need for sureties; the credit-worthiness of REBCOR or the Local; or the financial needs of the Fund. Again, no provision was made in the note for repaying principal before June 30, 1984, and Local 666 was not signatory on the note.

Subsequent to October 9, 1975, trustees Nash and Van Fossen, and administrator Zahn, again acting as directors and on behalf of REBCOR while continuing to serve as fiduciaries to the Fund, joined in the execution of a consent resolution dated September 30, 1975, authorizing REBCOR to borrow these additional funds.

On October 20, 1975, trustee Nash, on behalf of REBCOR, executed a note payable to the Fund with the same terms and conditions as the previous note. The second note was secured by a supplemental deed of trust. No loan origination fee was collected. Zahn was again responsible for having the loan documents drawn up by McGuire, Woods & Battle, but those loan documents varied from the terms authorized by the trustees in two material respects: (1) they did not impose on REBCOR an liability for interest incurred on money the Fund might be forced to borrow because of the REBCOR loans;[1] and (2) the note was for $500,000 instead of $400,000.

By March 1976, the total amount Zahn had actually disbursed to REBCOR was more than $1,411,000. The principal outstanding exceeded the trustees' maximum authorization by more than $11,000.

[1] At a later date, when the Fund was experiencing a serious cash-flow problem, REBCOR refused to honor this agreement since there was no written evidence of it.

Although there was no agreement to waive the timely payment of monthly interest, REBCOR's payment of interest due the Fund on its loan was sporadic between March and October 1975, and then ceased entirely until December 1976. By December 31, 1976, unpaid interest and penalties exceeded $140,000.

During the period of the delinquencies, trustees Nash and Van Fossen and administrator Zahn were intimately involved in the financial affairs of the Local and REBCOR. REBCOR's files were kept by Zahn in the Fund's offices until about June 1976. Trustee Nash signed all of REBCOR's check stubs during his tenure as secretary of REBCOR and, accordingly, was well aware that REBCOR was not making payments punctually to the Fund. In September 1976, Zahn reported to the REBCOR board of directors that $123,000 in delinquent interest was owed to the Fund. The Fund minutes for the same day do not reflect a report concerning a delinquency.

Zahn was delegated the duty of receiving and recording REBCOR interest payments and of reporting to the trustees should any difficulties have arisen. The financial reports prepared by Zahn and distributed to the trustees at each meeting reflected an "interest" line item prior to February 1975. Additionally, the minutes of trustees meeting of February 26, 1975, reflect that Accardi reported the receipt of an interest payment on the REBCOR loan. The Zahn financial reports failed to reflected any "interest" item again until February 1977.

On January 17, 1977, the Trustees held a meeting at which delinquent interest payments were discussed, and the trustees directed Zahn to provide them an up-to-date accounting of the loan status. By that time, REBCOR

was delinquent by at least $151,937.09 in interest and $9,227.39 in penalties. The Fund's 1975 DOL/IRS Form 5500, prepared by Zahn and signed on January 31, 1977, by trustees Accardi and Noonan falsely reported that no loans by the Fund or fixed income obligations due the Fund were in default as of December 31, 1975.

There followed various correspondence among the Trustees, Zahn, and the president of REBCOR; meetings; an appraisal of the property;[2] and, on February 28, 1977, a meeting of the Trustees[3] and the president of REBCOR. At that meeting, the REBCOR president proposed a solution to the delinquency problem. Further discussions, correspondence, and meetings ensued, and at their June 16, 1977, meeting, the trustees agreed to the following "cure": $86,196.81 of the unpaid interest was converted to principal to make the total principal $1,5 million as authorized by the Supplemental Deed of Trust note; the remaining $42,266.39 in unpaid interest was to be paid; and collection of the $7,874.72 in penalties was postponed for three years and would be waived

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[2] The appraisal, which was commissioned by REBCOR, was received on or about February 17, 1977. It valued the REBCOR property as of February 7, 1977, both land and building, at approximately $960,000, $160,000 of which was attributed to the land value. The appraisal reflected a reproduction cost in 1977 of $47.60 per square foot on the 24,552 square foot building. Almost three years earlier, the construction contract had been executed for $1,757,500 or $71.58 per square foot. A total of $1,815,315.39 was ultimately paid to the general contractor, which translated into a cost of $73.94 per square foot.

[3] By this time, successor trustees Bowles, Noonan, Jernigan, and Wilson had replaced lending trustees Cook, Nash, Van Fossen, and Koch. Lending trustee Baker had resigned but not yet been replaced. Successor trustee Parker took Baker's position by the time of the trustees' June 16, 1977, meeting.

altogether if the interest payments were kept current throughout that period.

Around this same time period in 1977, Davidson contacted the Department of Labor. He eventually spoke with DOL official Brophy who, at that time, was very interested in what Davidson had to say. Brophy advised Davidson that there was reason to believe that it might not be a proper transaction for a labor union to borrow money from a trust fund.

At a participants' meeting held shortly after the telephone conversation with Brophy, Davidson relayed to the trustees (some of whom were new) and to Zahn the information supplied to him by Brophy. In response to Davidson's comments, Zahn stated, in the presence of the trustees and other participants, that there could not be a problem because McGuire, Woods & Battle had inquired with the Department of Labor about whether the REBCOR loans were proper and had determined there was no problem.

Having received assurances that the loan was proper, Davidson called Brophy again and advised him that McGuire, Woods and Battle had already contacted the Secretary of Labor about these loans. Upon hearing this information, Brophy was no longer receptive to pursuing the matter.

There is, however, absolutely no evidence that McGuire, Woods and Battle ever contacted anyone at the Department of Labor concerning any aspect of the REBCOR loan transactions.

After being led to believe that the REBCOR loan

transactions were approved by the Department of Labor and were proper, Davidson thereafter directed his efforts towards resisting attempts within the union to increase his working assessments in order to pay for the REBCOR building. Davidson also sought aid from the International to prevent this working assessment increase, but the International refused to help him. All known avenues having been exhausted to no avail, Davidson refused to pay the working assessment increase and was expelled from the union.

By early 1979, the Fund's lack of liquidity had become so pronounced that one participant was denied preadmission hospitalization approval by Blue Cross-Blue Shield because the Fund had not paid its premiums in a timely manner. As of the February 8, 1979, trustees' meeting, the Fund had only about $123,350 in liquid assets available to pay over $348,000 in insurance premiums due, while $1,475,000 was tied up in the REBCOR loan.

An appraisal dated October 30, 1979, and commissioned by REBCOR, valued the collateral at from $907,000 to $1,000,000.

In April of 1981, Davidson, who was at that time low on bank hours, attended a trustees' meeting to obtain information about the Fund's operations in order to determine whether to self-pay or let his benefits terminate. He asked questions about employer contributions and Fund investments. In response to questions about the nature of the REBCOR loans, the trustees advised Davidson that the principal on the REBCOR notes was committed until June 30, 1984, and that there was nothing the trustees could do about raising the interest

rate or recovering the principal until that date. Davidson was given the impression that the current trustees did not want to discuss these matters with him and were being evasive.

Davidson filed suit on October 19, 1981.

This case revolves around the real estate lending practices of the lending fiduciaries and the evaluation of the REBCOR loan as an investment. Yet, not a single defendant came forward with proof of lending practices which would justify the manner in which the REBCOR loan was handled. Davidson alone undertook the task of providing the district court with the assistance of expert opinion on lending practices and the valuation of commercial real estate loans, i.e., affidavits of Bruce P. Hayden and David C. Tolzmann.

According to Mr. Hayden, handling a commercial real estate loan is a complex undertaking. Construction financing is especially risky because of the uncertainties beyond the borrower/developer's control — strikes, fires, delays caused by regulatory agencies, unanticipated cost increases, bankruptcies of contractors and subcontractors, the possibility of liens and other legal encroachments attaching to the property.

For these reasons, prudent and informed mortgage lenders carefully evaluate loan proposals. They take a formal, written application signed by the prospective borrower, which spells out the amount and terms of the loan, the purpose for which the funds are needed, an agreement to take the funds if approved, a security deposit to be forfeited if the loan is not taken down, and an advance deposit to cover fees or charges in connection

with the underwriting and issuance of the commitment, etc. The application should be accompanied by complete information on the subject property: plans, specifications, photographs, maps, surveys, zoning information, copies of existing or proposed leases, projected costs, projected operating expenses, credit information and the experience record in similar properties of the proposed borrower, and a market analysis demonstrating the need for and economic viability of the project.

After the application and accompanying information and documents have been submitted, the lender appraises the property, using its own staff or an appraiser of its own choosing, and billing the expense to the proposed borrower.

The lender then analyzes and underwrites all aspects of the transaction paying attention to location, the economic characteristics of the transaction, the suitability of the improvements, the indicated quality of construction, the record and reputation of the builder and architect, the detailed cost estimates with substantiation, copies of construction contracts, and requirements for bonding if there is any question about the financial responsibility of the parties. A written analysis and summary of the transaction is presented to the investment committee for final review.

If the transaction is approved, the lender issues a detailed commitment letter spelling out all the business details of the transaction and providing attorneys for both parties with an outline and blueprint from which the transaction can be structured legally.

During construction, reasonably competent construc-

tion lenders normally pay out only after the architect's certificate is checked, often after field verification of work done, and after the construction lender verifies that the total disbursed, including the presently contemplated disbursement, bears a proper relationship to the total cost of the building and to the progress of construction, e.g., that disbursements of forty-five percent of the loan proceeds will take place at the time when the building is forty-five percent completed, not twenty percent completed. There is also a check at the time of disbursement to make sure that adequate funds for completion are available in excess of those being provided from the construction loan. It was Mr. Hayden's opinion, after reviewing the stipulated facts and exhibits in this case, that these draw-down procedures were not followed with respect to the REBCOR loan, except for checking the architect's certificate, and that the union trustees (Cook, Nash and Van Fossen) agreed to fund the project knowing that funds necessary for completion were not in sight.

It was Mr. Hayden's opinion that the extent of documentation on the REBCOR loan would have been totally inadequate even for a $60,000 loan on an owner-occupied house. For example, the notes carry a provision for changing the rate of interest, but do not specify the circumstances, times, or amounts in which such changes could be made. There were no requirements for submission of regular quarterly or annual reports on the economics of the operation of the building securing the loan; no requirements for periodic financial statements of REBCOR, the borrower; none of the usual deed of trust and note provisions concerning possible fire or other casualty loss (the insurance provision being so minimal as to be meaningless), condemnation, or other contin-

gencies.

It was also Mr. Hayden's opinion that the loan was improperly priced. During the construction phase, it should have borne a floating interest rate tied to the prime rate. A 1 to 2 point fee should have been collected at the date of closing. Personal and corporate guarantees should have been required, at least during construction. Consideration should have been given to setting the interest rate after construction somewhat higher than the going A corporate bond rate for a term of twenty to twenty-five years, with provision for amortization. The only respect in which the lending fiduciaries satisfied any of this was to make the note callable 90 days after demand.

Within months after making the initial $1 million loan and without any investigation, either with respect to performance under the first loan (which Zahn was supposed to be monitoring and which was in default) or with respect to the ability of REBCOR to perform in the future, the lending trustees, at the urging of Mr. Zahn, approved the extension of an additional $400,000 in credit to REBCOR and failed to oversee the transaction to assure compliance with the terms of their approval (Zahn also handled this). In Mr. Hayden's opinion, no reasonably prudent real estate lender would have acted as they did.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED

There are a number of reasons why a writ of certiorari should be denied in this case.

First, there are no special or important reasons justifying review. Petitioners breached serious fiduciary duties owed to the participants and beneficiaries of the Fund (imprudence, divided loyalties, and conflicts of interest), causing a loss of almost $500,000 in the value of the Fund's investment portfolio. They are attempting to escape liability by erecting meritless, technical defenses which turn, essentially, on factual determinations: (1) whether Mr. Davidson had actual or constructive knowledge of the imprudence, divided loyalties, and conflicts of interest more than three years before filing suit (which shortens the normal six-year period), and (2) whether Zahn had or exercised sufficient discretionary authority, control or responsibility that he was a fiduciary of the Fund.

This Court does not sit to review conflicts of evidence or to second-guess the conscientious factual determinations of lower court judges. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951). This consideration should be given especially great weight where, as here, there is absolutely no disagreement between the district court and any of the judges on the circuit court panel.

Second, the court of appeals' decision is not in conflict with the decision of any other federal court of appeals on the same matter. This is conceded by petitioners Accardi, *et al.*, on page twenty-two of their petition, hereafter referred to as "Accardi Petition."

Third, the court of appeals has not so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of

supervision. Indeed, none of the petitioners have suggested such a reason for review.

Fourth, while the court of appeals has, through affirmance of the district court, decided important questions of federal law relating to ERISA's statute of limitations and definition of "fiduciaries," there is no need for any of those questions to be decided by this Court, and none of those questions have been decided in a way that conflicts with applicable decisions of this Court.

A. *General Overview of the Statute of Limitations*

The district court found that Davidson filed suit within ERISA's general six-year limitation period, 29 U.S.C. § 1113(a)(1) (App. p. 24a), and this ruling has not been challenged. Instead, the trustees erroneously seek to invoke the more narrow three-year limitation period of either (or both) § 1113(a)(2)(A) or § 1113(a)(2)(B).

ERISA is a comprehensive remedial statute enacted by Congress to protect the interests of participants and beneficiaries of private sector employee pension and welfare benefit plans by, among other things, establishing standards of conduct for fiduciaries of such plans. The fiduciary responsibility provisions are to be interpreted both in light of the common law of trusts and the special nature and purposes of employee benefit plans. *Donovan v. Mazzola*, 4 Employee Benefit Cases ("E.B.C.") 1865, 1869-70 (9th Cir., 1983).

As a broad remedial statute designed to protect plan participants and beneficiaries, ERISA is to be given a liberal construction to effectuate its purposes. *M & R Investment Co., Inc. v. Fitzsimmons*, 484 F. Supp. 1041,

1054 (D. NV, 1980). *See also*, Sutherland, *Statutory Construction*, v. 3, § 60.01 (4th ed., 1974). Humanitarian, remedial statutes have traditionally been interpreted liberally by the courts. *Tennessee Coal Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (wage and hour legislation). *See also, Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (securities law); *Sullivan v. Little Hunting Park,Inc.*, 396 U.S. 229, 237 (1969) (civil rights legislation); and *Urie v. Thompson*, 337 U.S. 163, 181-82 (1949) (Federal Employers' Liability Act).

Consistent with the liberal construction which must be afforded ERISA, any exemptions or limitations contained therein must be narrowly construed so as not to defeat the remedial purposes of the legislation. *See, A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

In civil actions, statutes of limitations are affirmative defenses as to which the defendant carries the burden of proof. *See, Knott v. Pemo Leasing Co., Inc.*, 472 F. Supp. 564 (D. Ohio, 1979); *Moore v. Kuehn*, 602 S.W.2d 713 (Mo. App., 1980). Thus, the lending fiduciaries, who are asserting the applicability of the exceptions to the general six-year period, must establish facts sufficient to invoke the shortened period of limitations.

The lending fiduciaries also argue that if the statute of limitations bars some claims relating to the REBCOR loans, it bars all claims relating to them. This is erroneous. Statutes of limitations bar the remedy, i.e., the judicial means for enforcing a particular cause of action. They do not extinguish the substantive right. Therefore, if one avenue of judicial redress is cut off, the substantive right can be enforced through other judicial means which are not. *Campbell v. Haverhill*, 155 U.S. 610, 619

(1895); 51 AM. JUR.2d, *Limitation Of Actions* § 22 (1970). *See also, Vinson v. Graham*, 44 F.2d 772, 776-77 (10th Cir., 1930) (defining the concept of "cause of action" as the breach of a duty owed to the plaintiff which results in harm to the plaintiff and gives him a right of redress against the defendant).

In addition, a statute of limitations, like all statutes, is to be construed so as to make it consistent in all its parts, so that proper effect may be given to every section, clause, or part, and so that no sentence, clause or word shall be deemed to be void, superfluous, or insignificant. *Orman v. Van Arsdell*, 12 N.M. 344, 350 (S. Ct. N.M., 1904). Words may be disregarded only when to do so is consistent with the legislative intent or meaning. Sutherland, *supra* p. 21, vol. 2A, § 47.37. ERISA gives plan participants the right to seek judicial relief with respect to each breach of fiduciary duty committed. The right to seek relief for one breach cannot be barred because the right to seek relief for another breach may be barred. Such a construction would render superfluous each of the distinct types of fiduciary duties which Congress has declared are owed to participants and beneficiaries, lumping them all into a sort of generic, catch-all duty.

For these reasons, the fact that an action for breach of some fiduciary duties (i.e., lack of diversification, loans to a party-in-interest, etc.) may be barred does not mean that an action for breach of other fiduciary duties (i.e., imprudence, conflicts of interest, and violating the exclusive purpose rule) is barred.

B. *Davidson Did Not Have Actual Knowledge of Any Breach of Fiduciary Duty*

Section 1113(a)(2)(A) of Title 29, United States Code,

serves to reduce the general six-year limitations period to three years from the date "on which the plaintiff had actual knowledge of the breach or violation." This narrowing of the six-year limitations period is applicable only to situations where the plaintiff both (1) had actual knowledge, not constructive knowledge, of the act constituting the breach and (2) knew that the act constituted a breach. In the absence of any ambiguity, the Courts give effect to the plain meaning of the statute. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Congress' use of the term "had actual knowledge" in § 1113(a)(2)(A) contrasts sharply with its use in 29 U.S.C. § 1451(f) of the term, "should have acquired actual knowledge." Additionally, the use of the words "actual knowledge" in other statutes has been held to mean precisely that: actual knowledge and not constructive or imputed knowledge. *In Re Venson*, 234 F. Supp. 271, 273 (D. Ga., 1964), *aff'd*, 337 F.2d 616, 617 (5th Cir., 1964); *Moore v. Kuehn, supra* p. 21, (bankruptcy legislation); and *Colby v. Riggs National Bank*, 92 F.2d 183, 194 (D.C. Cir., 1937) (Uniform Fiduciaries Act).

Congress explained the concept of "knowledge" under ERISA when fashioning the co-fiduciary liability rules. For example, 29 U.S.C. § 1105(a)(3) imposes personal liability on a fiduciary "if he has knowledge of a breach of such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." According to the legislative history, "if a fiduciary knows that another fiduciary of the plan has committed a breach, *and the first fiduciary knows that this is a breach*, the first fiduciary must take reasonable steps under the circumstances to remedy the breach. . . . ."

(Emphasis added.) House Conf. Rep. No. 93-1280, 93rd Cong., 2nd Session, p. 300, reprinted at 3 USCCAN (1974), p. 5080. Thus, to find simply "knowledge of a breach," not only must there be knowledge of an act constituting a breach, but there must also be knowledge that the act constituted a breach. *Brink v. DaLesio*, 496 F. Supp. 1350, 1383 (D.Md., 1980), *aff'd in part and rev'd in part (on other grounds)*, 667 F.2d 420 (4th Cir., 1981). *See also, Herman v. Painting Industry Insurance Fund*, 2 E.B.C. 2438 (S.D.N.Y., 1981) (determination of whether ERISA fiduciaries "knew" they were dealing with a party in interest.)

Given this meaning of the mere "knowledge of a breach" language of § 1105(a)(3), Congress must have intended a stricter interpretation to apply to the more precise terminology, "*actual* knowledge of the breach or violation," used in § 1113(a)(2)(A). The term "actual" rules out any constructive knowledge interpretation.

It is indeed strange for the lending trustees to assert actual knowledge on Davidson's part. The question of whether any of the defendants, below, had "knowledge of the breach" under § 1105(a)(3) was squarely presented in the district court. The lending fiduciaries were the active participants in the breaches; the successor trustees had complete access to all of the Fund's records; and all of the fiduciaries were charged with statutory duties under ERISA, including the duty of due diligence. Despite these factors, the district court found that not a single defendant had the requisite knowledge of any breaches. (App. pp. 36a-37a.)

In contrast, Davidson, like other Fund participants, had some knowledge of some very limited facts related

to the REBCOR loans. Whatever information that was disseminated was limited, contradictory, and at times, misleading. They heard in 1977 that the building was appraised at less than one million dollars, and they learned in 1977 that REBCOR was delinquent in its interest payments. On the other hand, they were informed that the 1977 delinquency "cure" would resolve the problems associated with the REBCOR loans, that the loans had been reviewed by McGuire, Woods & Battle, and that the loans had the approval of the Department of Labor.

At the time this case was submitted to the district court, Davidson was a 40 year old electrician. He has a twelfth grade education. Although Davidson had served on some Local 666 committees, he never held any union office, he never served as an ERISA fiduciary, he never served as an officer or director of REBCOR, and he never held any position with the Fund. For all practical purposes, Davidson was an outsider who had no knowledge concerning the deliberations and inner workings of the Fund and REBCOR (here the lender and the borrower).

Prior to contacting his present attorneys in 1981, Davidson knew nothing about the intricacies of prudent real estate lending practices (a standard imposed on the Fund fiduciaries by the prudence rule of ERISA). *Donovan v. Mazzola*, 2 E.B.C. 2115, 2133 (N.D. Cal., 1981), *aff'd*, 4 E.B.C. 1865, 1870 (9th Cir., 1983); *Marshall v. Glass/Metal Assoc. & Glaziers*, 507 F. Supp. 378, 384 (D. HI., 1980). Nor did he possess knowledge of what factors, documentation, or studies, if any, were considered by the trustees when the loans were made. Davidson did not know that over $1.4 million dollars was

loaned without any documentation and without consideration of crucial factors such as appraisals of the plans or projections of REBCOR's ability to pay.

Furthermore, prior to contacting his present attorneys in 1981, Davidson did not know the credit-worthiness of the borrower, whether there were any guarantors or sureties on the loans, the liquidity needs and reserve requirements of the Fund,[4] that the deed of trust notes were 90-day-notice demand instruments, that the first deed of trust provided for adjustments to the rate of interest without providing a specific mechanism for making adjustments, that there was no assignment of rents, or that there was no principal repayment schedule. Nor did Davidson know that two trustees and Zahn had acted as REBCOR directors (while they were Fund fiduciaries with respect to the REBCOR investment) to authorize REBCOR to borrow from the Fund.

The only actual knowledge finding the district court made with respect to Davidson was that he knew that trustees Noonan and Bowles served contemporaneously as directors of REBCOR and as trustees of the Fund. The court, therefore, erroneously concluded that Davidson had actual knowledge of conflicts of interest, in violation of 29 U.S.C. § 1106(b)(2). (App. pp. 29a-30a.) However, 29 U.S.C. § 1108(c)(3) expressly permits the holding of positions of potential conflict. To constitute a violation of § 1106(b)(2), the fiduciary must *act* on both sides of a transaction.

[4] The reserves of the Fund are used to provide coverage to employees during periods of unemployment through a system of bank hours. At the end of 1981, almost all of the reserves were tied up in this investment. The first time the bank hour liability was disclosed on the Fund's financial statement was on the financial statement for the year ended December 31, 1981, which was prepared after plaintiff brought this suit.

In summary, the lending trustees assert that Davidson had either actual or constructive knowledge of the "essential facts" and that the standard to be applied is an "integrated view of Davidson's actual and constructive knowledge." (Accardi Petition, p. 32.) To the contrary, § 1113(a)(2)(A) is triggered only by "actual knowledge of the breach or violation" sought to be barred.[5] Davidson did not have actual knowledge of the acts or omissions of the Fund fiduciaries or actual knowledge that any of those acts or omissions constituted ERISA breaches. Without a showing that he had both, there is simply not enough evidence to overturn the lower court decisions that Davidson did not possess the requisite "actual knowledge of the breach or violation." (App. pp. 29a-30a; 66a, note 17.)

C. *The Reporting Exception Does Not Apply Because the Fund Fiduciaries Did Not Disclose the Breaches At Issue*

Section 1113(a)(2)(B) of Title 29, United States Code, provides for a three year limitations period beginning on the date "on which a report from which [a plaintiff] could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secre-

[5] An early version of the statute of limitation *was* triggered by mere knowledge of facts. It provided that "[n]o action, suit, or proceeding based on a violation of this section shall be maintained unless it be commenced within three years after the filing with the Secretary of a report, statement, or schedule with respect to any matter disclosed by such report, statement, or schedule, or, with respect to any matter not so disclosed, within three years after the complainant otherwise has notice of the facts constituting such violation. . . ." S.1557 § 14(h), 93d Cong., 1st Sess. 36 (1973), *reprinted in* I Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974, at 315 (1976). But, Congress rejected that standard in favor of the stricter language in § 1113(a)(2).

tary under this subchapter." The purpose and effect of this provision is to encourage the filing of full and accurate reports which are required by the Act. Criminal penalties back up the requirement. 18 U.S.C. § 1027.

The plain language of the statute of limitations makes it clear that the report itself must impart knowledge of the breach. There is no authority to support a theory that combines this exception with the "actual knowledge" exception, as the lending fiduciaries argue (Accardi Petition, at 32), in order to create a hybrid exception to the six-year rule, i.e., some actual knowledge plus some constructive knowledge equals the requisite actual and/or constructive knowledge. If the report does not disclose the existence of an actionable claim of fiduciary breach, the requirements of the statute are not satisfied.

The ERISA report most likely to disclose a fiduciary breach is the annual report (Form 5500) filed by the plan administrator with the Secretary pursuant to 29 U.S.C. § 1024(a)(1)(A). In this report, fiduciaries must disclose extensive information concerning plan financial operations and fiduciary activities, as required by 29 U.S.C. § 1023.

None of the Form 5500's filed by the Fund fiduciaries disclosed: (1) the imprudence involved in making the REBCOR loans; (2) the fact that Nash, Van Fossen, and Zahn acted as REBCOR directors to authorize the borrowing of the money; or (3) that the lending fiduciaries were trying to provide a home for the Local instead of serving the exclusive purpose of providing benefits to participants and their beneficiaries.[6] Therefore, the

[6] The lending trustees assert that Davidson's claim under 29 U.S.C. § 1104(a)(1)(D) and the Virginia Prudent Man Statute, which was held

three-year limitations period based on filings is unavailable.[7]

D. *Zahn Was a Statutory Fiduciary with Respect to the REBCOR Investment*

Zahn's entire brief is devoted to erroneously challenging the lower courts' determination that Zahn was a

barred by the statute of limitations (App. p. 28a), was identical to his claim of imprudence under 29 U.S.C. § 1104(a)(1)(B), which should, therefore, also be barred. (Accardi Petition, at 24.) Davidson, however, neither requested, nor received, a ruling on the broad question of prudence under the Virginia Prudent Man Statute. He requested a ruling on whether the overconcentration of Fund assets in the REBCOR loan (a diversification claim) was a violation of 29 U.S.C. § 1104(a)(1)(D) and the Virginia Prudent Man Statute. (Plaintiff's Proposed Findings of Fact and Conclusions of Law, p. 13, no. 23, Court of Appeals Joint Appendix, at 35.) Accordingly, the district court, treating this as a diversification claim, ruled that it was barred by the statute of limitations for the same reasons that the ERISA diversification claim was held barred by the statute of limitations. (App. pp. 18a-19a, 28a.) Logic dictates that, if Davidson had presented this claim as one of prudence and the district court had ruled that it was identical to the ERISA prudence claim, the court would have also ruled that it survived the statute of limitations defense just as the ERISA prudence claim. Furthermore, the ERISA prudence standard is not identical to the common law rule embodied in the Virginia rule, i.e., how a prudent man would invest his own property. Va. Code § 26.45-1. The ERISA rule is a more stringent rule, i.e., how a man familiar with such matters would invest the property of others. *See*, Kroll & Tauber, *Fiduciary Responsibility and Prohibited Transactions*, 14 Real Property, Probate & Trust Journal 657, 662 (Winter 1979).

[7] The lending fiduciaries argue that some of the structural deficiencies (e.g., lack of an amortization schedule) were apparent from the face of the note filed with Form 5500 for the year 1976 and, thus, served to impart constructive knowledge of all breaches. (Accardi Petition, at 29.) To the contrary, for example, an amortization schedule could have been set forth in a side agreement; a provision for adjusting the rate of interest was contained in the deed of trust, although it was not contained in and, therefore, not apparent from the face of the note; and Mr. Hayden indicated that a balloon note could have been structured in an acceptable manner.

statutory fiduciary with respect to the REBCOR investment.

A "person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan ... ." 29 U.S.C. § 1002(21)(A). Congress adopted a functional approach to determine who the fiduciaries of a plan are. *Brink v. DaLesio, supra* p.24, 496 F. Supp. at 1374-75; *Marshall v. Mercer*, 4 E.B.C. 1523, 1528 (N.D. Tex., 1983); *Eaton v. D'Amato*, 3 E.B.C. 1003, 1005-1006 (D.D.C., 1980).

Zahn possessed and exercised a generous degree of latitude over the day-to-day administration of the Fund and the REBCOR investment. This made him a statutory fiduciary.

Fifth, Zahn's due process claim (Zahn Petition at 19, *et seq.*) is improperly cast in terms of the Fourteenth Amendment, which applies to the States, instead of the Fifth Amendment, which applies to the Federal Government. *See, United States v. Banmiller*, 198 F. Supp. 872, 875 (n.l) (E.D. Pa., 1961), *reversed on other grounds*, 310 F.2d 720 (3d Cir., 1962). In addition, Zahn has not complied with Rule 28(b) of this Court, which requires notification to the Solicitor General when the constitutionality of an Act of Congress is drawn into question and neither the United States nor any department, office, agency, officer, or employee thereof is a party. The defects in presenting this issue demonstrate its insignifi-

cance, even in Zahn's view.

Furthermore, a review of Zahn's Answer, Amended Answer, Trial Brief and Reply Brief filed in the district court, and Brief and Reply Brief for Appellant filed in the court of appeals reveals that this due process claim has never before been raised in this proceeding. Thus, it would not properly be before this Court on certiorari. *Tennessee v. Dunlap*, 426 U.S. 312, 316 (n.3) (1976).

CONCLUSION

There is no reason justifying review of this cause; therefore, both petitions for a writ of certiorari should be denied.

Respectfully submitted,

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